



MISSISSIPPI ETHICS COMMISSION

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ETHICS AND OPENNESS IN GOVERNMENT

Election Commissioners Annual Meeting
January 22, 2016

Notice: The following information is provided for education only and is not an official written opinion of the executive director of the Mississippi Ethics Commission and does not provide any legal protection from liability. That process is outlined in Section 25-4-17(i)(ii), Miss. Code of 1972, and Rules 27-28 of the Rules of the Mississippi Ethics Commission, and is further explained at www.ethics.state.ms.us.

OVERVIEW OF THE MISSISSIPPI ETHICS COMMISSION

- Eight members serve staggered terms.
- Members appointed by Governor, Lieutenant Governor, Speaker of the House and Chief Justice.
- Commission staff is supervised by an executive director who serves at the Commission's will and pleasure.

Areas of Jurisdiction for the Ethics Commission

- Ethics in Government Law
- Public Records Act
- Open Meetings Act

MISSISSIPPI'S ETHICS IN GOVERNMENT LAW

"The Legislature hereby declares it essential to the proper operation of democratic government that public officials and employees be independent and impartial; that governmental decisions and policy be made in the proper channels of the governmental structure; that public office not be used for private gain other than the remuneration provided by law; that there be public confidence in the integrity of government; and that public officials be assisted in determinations of conflicts of interest."

Section 25-4-1, Miss. Code of 1972

Eight Basic Prohibitions:

- Board Member Contracts
- Use of Office
- Contractor, Subcontractor or Vendor
- Purchasing Goods and Services
- Purchasing Securities
- Insider Lobbying
- Post Government Employment
- Insider Information

Board Member Contracts

Section 109, Miss. Constitution of 1890:

No public officer or member of the legislature shall be **interested, directly, or indirectly**, in any **contract** with the state, or any district, county, city, or town thereof, **authorized** by any law passed or order made by any board of which he may be or may have been a member, **during a term** for which he shall have been chosen, **or within one year** after the expiration of such term.

Notes about Section 109:

- Section 109 only applies to members of boards and the Legislature.
- Notice the prohibition is against an interest, not against an act.
- There must be some sort of contract; it need not be a written contract.
- The conflict arises when the board funds or otherwise authorizes the contract. Even if the individual member does not vote, he or she may be in violation.
- The prohibition continues until a former official has been out of office for one year.

Selected Advisory Opinions Concerning Section 109:

- Opinion No. 15-069-E: A soil and water conservation district may not award a contract to a company whose partners include a member of the board of directors of the district and a county supervisor. A violation of Section 109, Miss. Const. of 1890 and Section 25-4-105(2) & (3)(a), Miss. Code of 1972, will occur if the district awards the contract to the company.

- Opinion No. 15-032-E: A county may not continue to purchase merchandise at a retail store which employs a candidate for county supervisor and may not continue to purchase insurance from an agency which employs the candidate's spouse if the candidate is elected. If elected, the candidate will have a prohibited interest in transactions between the county and the store and agency, and those transactions will be authorized by the board of supervisors in violation of Section 109 and Section 25-4-105(2).

Use of Office

Section 25-4-105(1):

(1) No **public servant** shall **use his official position** to obtain, or attempt to obtain, **pecuniary benefit** for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any **relative** or any **business with which he is associated**.

Notes about Section 25-4-105(1):

- The statute does not require a public servant misuse his or her position.
- To avoid a violation, a public servant must totally and completely **recuse** himself or herself from the matter giving rise to the conflict.
- A board member must leave the board meeting before the matter comes up for discussion, may only return after the matter is concluded, and must not discuss the matter with anyone.
- An abstention is considered a vote with the majority and is not a recusal. The minutes of the meeting should accurately reflect the recusal.
- **Recusal *does not* prevent other violations.**

Definitions (Section 25-4-103):

"Relative" is the public servant's

- spouse,
- child,
- parent,
- sibling (brothers and sisters) or
- spouse of a relative (in-laws).

"Business with which he is associated" means any business in which public servant or his relative is:

- officer, director, owner, partner, employee or;
- holder of more than ten percent (10%) of the fair market value or;
- from which he or his relative derives more than \$2,500 in annual income or;
- over which such public servant or his relative exercises control.

Selected Advisory Opinions Concerning Section 25-4-105(1):

- Opinion No. 07-062-E: A candidate's brother-in-law or parent may not serve as a poll worker in a precinct in which the candidate appears on the ballot. Section 25-4-105(1) prohibits a public servant like a poll worker from using his or her position in government to obtain pecuniary benefit for a "relative." A candidate's relative may not serve as a poll worker since such a situation may lead to suspicion among the public about the impartiality of the election process, which should be avoided pursuant to Section 25-4-101.
- Opinion No. 04-094-E: A county election commission should not appoint its members' parents as poll workers as it damages the public trust in a fair and impartial election process and does not comply with the public policy mandate set forth in §25-4-101. Also, §25-4-105(1) will absolutely prohibit a county election commissioner from participating in the appointment of and/or the approval of compensation for poll workers when one of the poll workers is the commissioner's parent. However, the appointment of a county election commissioner's aunt as a poll worker cannot violate §25-4-105(1) and does not raise the same concerns under the public policy provision of §25-4-101 as does a parent's appointment.

Contractor, Subcontractor or Vendor

Section 25-4-105(3)(a):

(3) No public servant shall: (a) Be a **contractor, subcontractor or vendor with the governmental entity** of which he is a member, officer, employee or agent, other than in his contract of employment, **or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity** of which he is a member, officer, employee or agent.

Selected Advisory Opinions Concerning Section 25-4-105(3)(a):

- Opinion No. 14-063-E: Pursuant to Section 25-4-105(3)(a), a physician employed by a county-owned community hospital may not serve as an independent contractor to the hospital.
- Opinion No. 13-085-E: A county election commissioner may also be employed by the county road department. Pursuant to the exception found in Section 25-4-105(4)(h), the county election commission and the county road department are separate authorities of county government. However, the public servant cannot use his official position as election commissioner to obtain or attempt to obtain any pecuniary benefit for himself in violation of Section 25-4-105(1).

Purchasing Goods or Services

Section 25-4-105(3)(b):

(3) No public servant shall: (b) Be a **purchaser, direct or indirect**, at any sale made by him in his official capacity **or by the governmental entity of which he is an officer or employee**, except in respect of the sale of goods or services when provided as public utilities or offered to the general public on a uniform price schedule.

- For example, this subsection prohibits a government employee or official from purchasing anything at an auction or other sale conducted on behalf of his or her governmental entity.

Purchasing Securities

Section 25-4-105(3)(c):

(3) No public servant shall: (c) Be a purchaser, direct or indirect, of any claim, certificate, warrant or other security issued by or to be paid out of the treasury of the governmental entity of which he is an officer or employee.

Insider Lobbying

Section 25-4-105(3)(d):

(3) No public servant shall: (d) Perform any service for any compensation during his term of office or employment by which he attempts to influence a decision of the authority of the governmental entity of which he is a member.

Post Government Employment

Section 25-4-105(3)(e):

(3) No public servant shall: (e) Perform any **service** for any **compensation** for any **person or business after termination** of his office or employment in relation to any **case, decision, proceeding or application** with respect to which he was **directly concerned or in which he personally participated** during the period of his service or employment.

Notes about Section 25-4-105(3)(e):

- Applies after someone leaves government;
- If you worked on a matter while you were in government, you cannot work on that same matter in the private sector;
- But a former government employee can work for a government contractor on other matters.

There are several exceptions to the restrictions in Section 25-4-105(3). The exceptions only apply to Subsection (3) and not to any other provisions of the ethics laws law.

Insider Information

Section 25-4-105(5):

(5) No person may intentionally use or disclose **information gained in the course of or by reason of his official position or employment** as a public servant in any way that could result in **pecuniary benefit for himself, any relative, or any other person**, if the **information has not been communicated to the public or is not public information**.

Notes about Section 25-4-105(5):

- Comes up most often in connection with economic development;
- Non-public information may not be revealed if it might result in a monetary benefit to anyone;
- Could apply to a former public servant.

The Ethics Complaint Procedure

Investigation and Enforcement of Ethics in Government Violations

Notes about enforcement of ethics laws:

- No criminal provisions.
- Ethics Commission investigates:
 - Violations of law by public servants;
 - Failure to file financial disclosure information required by law.

Complaint Process:

- Sworn complaint must be filed alleging a violation of law by a public servant before an investigation can be conducted.
- If investigation is authorized by Commission, it is conducted before respondent is notified.
- Respondent has 30 days to file a response.
- All investigative proceedings and records are strictly confidential, and breach of confidentiality constitutes a crime.

Enforcement:

- Commission holds hearings to determine guilt and to impose penalties.
- Appeals go to Hinds County Circuit Court.
- Commission may impose fines up to \$10,000 per violation of the ethics laws, order repayment of money and impose censures and other legal/equitable remedies on all public servants.
- Commission can only ***recommend*** that Hinds County Circuit Court remove an official or suspend or demote an employee.

Fines and Other Penalties

- The Commission may fine individuals for failing to timely file a statement of economic interest. After written notice and a fifteen-day grace period, the Commission may levy fine of \$50 per day.

- Fine for refusing to file the SEI is \$10,000. Misdemeanor is committed when filer has not filed one year after notice of delinquency.
- Maximum fine for ethics violation is \$10,000 per violation.

Ethics Advisory Opinions

Notes about Advisory Opinions:

- Commission issues anonymous advisory opinions every month to public servants who need advice about complying with the Ethics Law.
- Opinion must be requested in writing by a public servant or candidate for elected office.
- If you get an opinion from the Ethics Commission, and you follow it, you are immune from liability under the Ethics Law.
- Commission's staff gives informal guidance based on past opinions, but the only way to be protected from liability is to obtain an official written opinion.

PUBLIC RECORDS ACT

Application of the Public Records Act:

- All documents and other records, including electronic records, related to government business are public records.
- The Act applies equally to paper and electronic records.
- Everyone has the right to inspect or copy public records.
- Many records are exempt from review/production.
- If record contains exempt material, government may have to redact and copy.

Selected Public Records Cases:

Miller v. Rankin Co. Sch. Dist., R-14-001:

- Electronic records like teachers' emails are public records subject to production if they concern any work of the school district, unless exempted or privileged.

NE Miss. Daily Journal v. Tupelo R-13-023:

- Text messages concerning city business sent by the mayor in his role as chief executive officer of the city qualify as public records, even though sent from the mayor's personal phone.
- Any text message used by a government official "in the conduct, transaction or performance of any business, transaction, work, duty or function of [the government]" is a public record, regardless of where the record is stored. The public body must keep all written denials letters for at least three years.

Responding to Public Records Requests:

- Public body must respond to public records request within 1 working day, if no public records policy is in place.
- Public body may adopt a policy allowing up to 7 working days to respond or 14 days with a written explanation of the delay.
- Public body must respond by producing documents or denying the request in writing. Public body may require prepayment of reasonably calculated **actual costs** of searching, reviewing, redacting, duplicating and mailing public records.
- Labor costs of searching, reviewing and redacting records must be charged at the rate of the lowest paid person competent to fulfill the request.
- Any attempt by a public body to impose fees exceeding actual costs reasonably incurred constitutes a willful and knowing denial of access to public records that warrants the imposition of a civil penalty and the award of attorney fees and costs. Harrison Co. Dev. Commn. v. Kinney, 920 So.2d 497 (Miss. App. 2006).

Denying Public Records Request:

- Denial of public records request must be in writing.
- The written denial must identify the specific exemption relied upon by the public body.
- The public body must keep all written denials letters for at least three years.

Records Exempt from Production:

Section 25-61-11 provides that records can be exempt from the Act if a constitutional or statutory law or court decision "specifically declares" that the public record is "confidential or privileged" or is exempt from the Act.

Confidential Business Information:

- Public records furnished by third parties which contain trade secrets or confidential commercial or financial information are exempt from disclosure.

- Public body must give notice to third party which must have reasonable time to obtain protective order.
- If protective order is not obtained by third party, then public body must produce the records.

Common Exemptions: Investigative Reports:

- Defines "incident report," "investigative report" and "law enforcement agency."
- Incident report must include identity of person arrested, date, time, location and nature of offense.
- Incident report must be disclosed.
- Investigative reports may contain detailed information about crime and victim.
- Investigative reports do not have to be disclosed.

Other examples of records that may be exempt from production under the Public Records Act:

- Appraisal records, § 31-1-27
- Archaeological records, § 39-7-41
- Attorney work product, § 25-1-102
- Bureau of vital statistics, § 41-57-2
- Charitable organizations, registration information, § 79-11-527
- Concealed pistols or revolvers, licenses to carry, § 45-9-101
- Confidentiality, ambulatory surgical facilities, § 41-75-19
- Commitment records related to certain treatment at Miss. State Hospital or East Miss. State Hospital, § 41-31-17.
- Lunacy defendants records, § 41-32-7
- Environmental self-evaluation reports, § 49-2-71
- Hospital records, § 41-9-68
- Individual tax records in possession of public body, § 27-3-77
- Insurance companies risk based capital level reports, § 83-5-415
- Judges and assistants records, § 9-1-38
- Jurors' notes, § 13-5-97
- Licensure application and examination records, § 73-52-1
- Medical examiner, records and reports, § 41-61-63
- Personnel files, § 25-1-100
- Personal contact information on judges, police officers, prosecutors, or victims of crime, § 25-61-12
- Personnel files, § 25-1-100
- Social security numbers, telephone numbers, dates of birth, with regard to voter registration files and poll books, § 23-16-165

- Trade secrets, proprietary commercial/financial information, § 79-23-1
- Treatment records related to commitments for abuse of certain substances, § 41-30-33
- Workers' compensation records, § 71-3-66

Public Records Complaints:

Section 25-61-13 sets forth procedure for resolving disputes arising under the Public Records Act.

- Complaint may be filed with the Commission or the appropriate chancery court.
- Commission will send a copy of the complaint to the public body which has the opportunity to respond.
- Commission may dismiss complaint, make preliminary finding or hold a hearing.
- The Commission can order the public body or its officials/employees to produce records and other reasonable measures.
- The Commission's decision may be enforced through or appealed to the local chancery court.

OPEN MEETINGS ACT

Application of the Open Meetings Act:

- Public meetings must be open to public.
- Executive session must follow a specific procedure and can only be held for 12 reasons.
- Notice of meeting must be given.
- Minutes of meeting must be kept.
- Social gatherings are not "meetings" unless official business is discussed.
- Act never requires executive session.

Selected Open Meetings Cases:

Gregory v. Columbus City Council, M-14-002:

- Deliberations of a quorum must take place in a proper public meeting.
- When a quorum of the council splits into separate groups and discusses the same matter of city business with the mayor, a quorum is deliberating, and a "meeting" has occurred.

McGovern v. Starkville, M-12-020:

- Retreats conducted by the Board of Aldermen are meetings subject to the Open Meetings Act.
- Even if no official action is taken at a meeting, minutes must be kept.
- Committees established by the board to conduct business of the city are subject to the Open Meetings Act.

Jones v. Yazoo City, M-12-010:

- Mayor telephoned a quorum of the board to discuss a matter of city business.
- Does not matter that he called each board member separately.
- The phone conversations constitute an illegal meeting without notice or minutes.
- NOT a violation for mayor or individual board members to discuss city business, as long as the conversations do not encompass a quorum discussing same subject. Notice of meeting must be given.
- Minutes of meeting must be kept.

Notice of Meetings (Section 25-41-5):

- Regular meetings of some public bodies are set in statute.
- If not set by statute, the times, places, and procedures of meetings must be spread upon the public body's minutes.
- For recess, adjourned, interim or special meetings, notice must be posted in the building where the public body normally meets within one hour of calling the meeting.
- Copy of the notice must be placed in the minutes.

Minutes of Meetings (Section 25-41-11):

- Minutes must be kept for all meetings, whether in open or executive session.
- Minutes must be "recorded" (drafted) within 30 days after meeting.
- Minutes are not transcripts. The purpose of the minutes is to record what actions were taken at the meeting, not to record everything that was said or discussed.
- Minutes must be available for public inspection during regular business hours.

Content of Minutes (Section 25-41-11):

- Members present and absent;
- Date, time and place of meeting;
- Accurate recording of any final actions;

- Record, by individual member, of all votes taken;
- Any other information requested by the public body.

Public Participation:

- An agenda and materials that will be distributed to members of the public body must be made available to the public at the time of the meeting. Members present and absent (Section 25-41-5(4)).
- Public body may make and enforce reasonable rules for conduct of persons attending meetings (Section 25-41-9).
- Public body may not ban cameras or other recording devices from an open meeting.
- Public body must take reasonable means to ensure all members of the public who attend are able to “see and hear everything that is going on”.

Executive Session (Section 25-41-7(4)):

A public body may only enter executive session for 12 reasons which are summarized below:

- (a) personnel matters
- (b) litigation
- (c) security
- (d) investigations
- (e) the Legislature may enter executive session for any reason.
- (f) cases of extraordinary emergency
- (g) prospective purchase, sale or leasing of lands
- (h) discussions between a school board and individual students who attend a school within the jurisdiction of such school board or the parents or teachers of such students regarding problems of such students or their parents or teachers.
- (i) preparation of professional licensing exams
- (j) location, relocation or expansion of a business
- (k) budget matter which may lead to termination of employee
- (l) certain PERS board investments

Selected Open Meetings Cases:

Harding v. City of Bay St. Louis , M-12-005 & M-12-006:

- “Personnel matters” exception does not apply the job performance of an independent contractor to the government.

- "Personnel Matters" are restricted to matters dealing with employees hired and supervised by the board, not those employees of some other public official, and not other public officials themselves
- An independent contractor such as an accountant, lawyer, or architect is not an employee of the board, and would not normally come under "personnel."

Rody v. Pearl River Co. Bd. Of Sup. M-12-012:

- "Litigation" includes "strategy sessions or negotiations with respect to prospective litigation, litigation or issuance of an appealable order when an open meeting would have a detrimental effect on the litigating position of the public body."

Executive Session Procedure:

1. The meeting must begin as an Open Meeting. *[Miss. Code Ann. § 25-41-7(1)]*
2. A member must make a motion in an Open Meeting for the meeting to be closed to determine whether or not the Board should declare an executive session. The statute does not require a second to this motion, but the vote on this motion is taken in Open Meeting. If a majority votes to close the meeting to make a determination on the question of an executive session, the meeting is closed for this purpose. *[Miss. Code Ann. § 25-41-7(2)]*
3. No other business during this closed interim shall be considered until a vote has been taken on whether or not to declare an executive session. *[Miss. Code Ann. § 25-41-7(2)]* In order to go into executive session, a majority of three-fifths of those present must vote in favor of it. *[Miss. Code Ann. § 25-41-7(1)]*
4. The Board must then state in Open Meeting the reason for going into executive session, and this reason and total vote thereon must thereafter be recorded on the minutes of the meeting. *[Miss. Code Ann. § 25-41-7(3), (5)]*
5. The vote to go into executive session is applicable only to that particular meeting on that particular day. *[Miss. Code Ann. § 25-41-7(6)]*

Stating the Reason for Executive Session:

The Mississippi Supreme Court has explained that a public body must state a meaningful reason for going into executive session: "A board which only announces "litigation" or "personnel matters" for going into executive session has said nothing. It might as well have stated to the audience, "Ladies and gentlemen, we are going into executive session," and stopped there. The Act requires that a board cannot use its statutory authority to go into executive session upon certain matters as a device to circumvent the very purposes for which it is under the Open Meetings Act. The purpose of the Act is that the

business conducted at all meetings of public boards be wide open.” Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107, 113-114 (Miss.1989).

Open Meetings Complaints:

Section 25-41-15 empowers the Ethics Commission to enforce the Open Meetings Act as follows.

- Complaint is filed with Commission. Complaint is sent to public body, which has the opportunity to respond. Commission can dismiss complaint or hold a hearing.
- Ethics Commission may order public body to comply with law and can impose fines of \$500 to \$1,000 on board members.
- Ethics Commission can mediate Open Meetings disputes.
- Either party may appeal or enforce Ethics Commission order in local chancery court.